

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

*Orig. Affidavit of
marilyn*
77-2037

To be argued by
MARILYN GAINEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2037

HERBERT SPERLING.

Petitioner-Appellant,

--against--

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE RESPONDENT-APPELLEE

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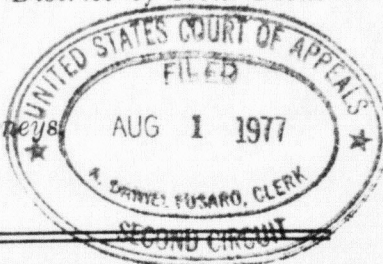




TABLE OF CONTENTS

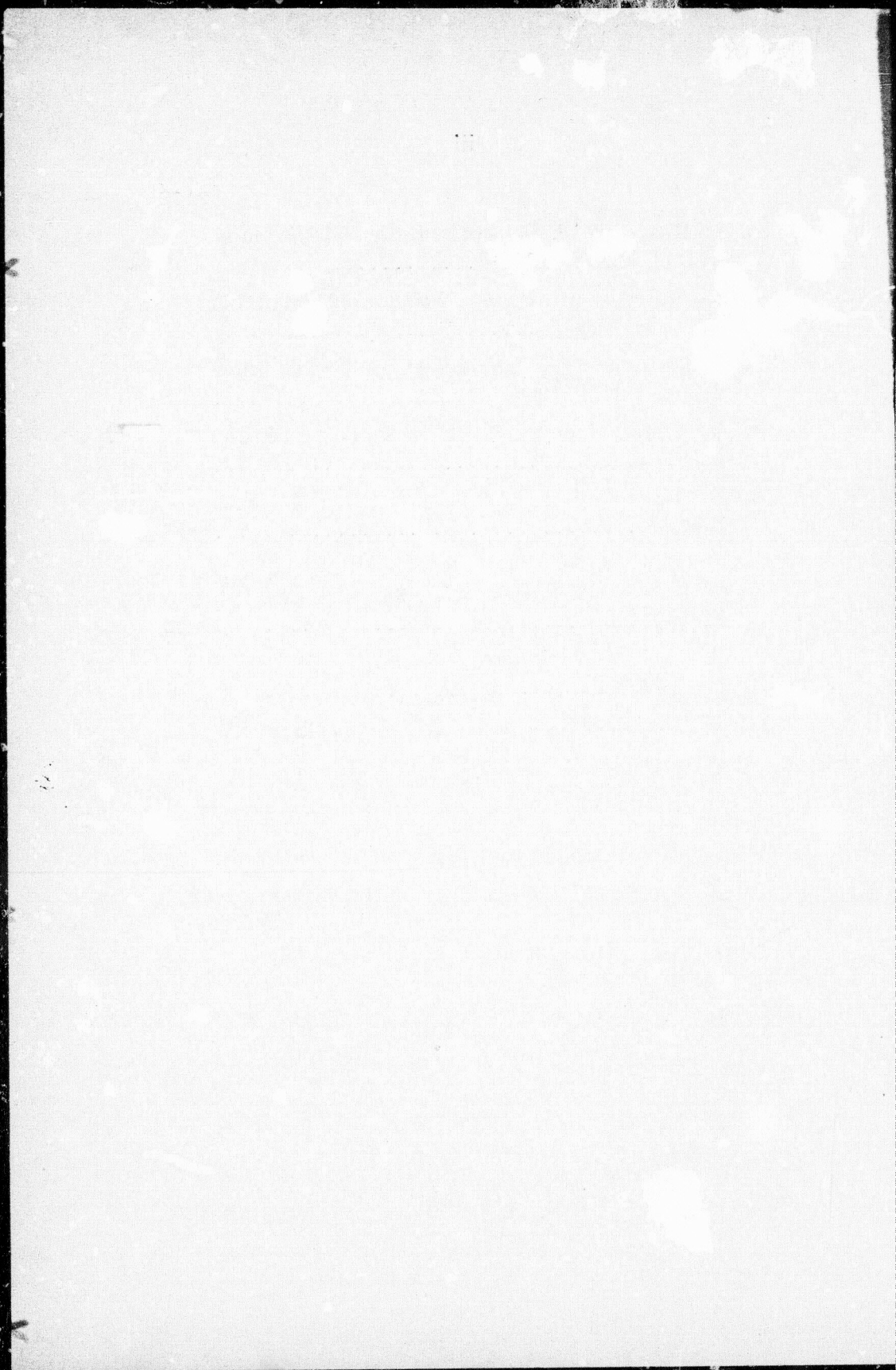
	PAGE
Preliminary Statement	1
Statement of Facts	2
ARGUMENT:	
POINT I—A Judge's Participation In Plea Negotia- tion Does Not Per Se Render That Plea Involun- tary	4
POINT II—The Defects In The Plea Proceedings Were Not Such As To Deprive Appellant Of Any Sub- stantial Right	7
POINT III—The District Court Properly Rejected Appellant's Motion To Vacate And Set Aside His Sentence And Conviction Without An Evi- dentiary Hearing	14
CONCLUSION	15

TABLE OF CASES

<i>Berry v. United States</i> , 412 F.2d 189 (3d Cir. 1969)	5
<i>Brady v. United States</i> , 397 U.S. 742 (1970)	4, 7
<i>Bye v. United States</i> , 435 F.2d 177 (2d Cir. 1970) ..	3, 5
<i>Davis v. United States</i> , 417 U.S. 333 (1974)	12
<i>Del Vecchio v. United States</i> , — F.2d — (Slip. op. 805) (2d Cir., decided May 24, 1977)	13
<i>Durant v. United States</i> , 410 F.2d 689 (1st Cir. 1969)	5
<i>Fontaine v. United States</i> , 411 U.S. 213 (1973) ...	14
<i>Ford v. United States</i> , 418 F.2d 855 (8th Cir. 1969)	7

	PAGE
<i>Halliday v. United States</i> , 394 U.S. 831 (1969) ...	6
<i>Harris v. United States</i> , 426 F.2d 99 (6th Cir. 1970)	5
<i>Heflin v. United States</i> , 358 U.S. 415 (1959)	12
<i>Hill v. United States</i> , 368 U.S. 424 (1962)	12
<i>Irizarry v. United States</i> , 508 F.2d 960 (2d Cir. 1975)	3
<i>Jenkins v. United States</i> , 420 F.2d 433 (10th Cir. 1970)	5
<i>Kloner v. United States</i> , 535 F.2d 730 (2d Cir. 1976)	9
<i>Korenfeld v. United States</i> , 451 F.2d 770 (2d Cir. 1971), <i>cert. denied</i> , 406 U.S. 975 (1972)	3, 6
<i>Machibroda v. United States</i> , 368 U.S. 487 (1962) ..	14
<i>McCarthy v. United States</i> , 394 U.S. 459 (1969) ..	6, 8
<i>McGrath v. LaVallee</i> , 348 F.2d 373 (2d Cir. 1965), <i>cert. denied</i> , 383 U.S. 952 (1966)	4
<i>Munich v. United States</i> , 337 F.2d 356 (9th Cir. 1964)	5
<i>North Carolina v. Alford</i> , 400 U.S. 25 (1970)	6
<i>Rake v. United States</i> , 2331 F. Supp. 813 (W.D. Va. 1964)	12
<i>Sappington v. United States</i> , 468 F.2d 1378 (8th Cir. 1972), <i>cert. denied</i> , 411 U.S. 970 (1973)	9
<i>Shelton v. United States</i> , 246 F.2d 571 (5th Cir. 1957)	7
<i>Smith v. United States</i> , 116 U.S. App. D.C. 404, 324 F.2d 436 (1963), <i>cert. denied</i> , 376 U.S. 957 (1964)	5
<i>Trujilla v. United States</i> , 377 F.2d 266 (5th Cir.), <i>cert. denied</i> , 389 U.S. 899 (1967)	5

	PAGE
<i>United States ex rel. Delman v. Butler</i> , 390 F. Supp. 606 (E.D.N.Y. 1975)	6
<i>United States ex rel. Rosa v. Follette</i> , 395 F.2d 721 (2d Cir. 1968)	4
<i>United States ex rel. Elknis v. Gilligan</i> , 256 F. Supp. 244 (S.D.N.Y. 1966)	5
<i>United States v. Journet</i> , 544 F.2d 633 (2d Cir. 1976)	8
<i>United States v. Monte</i> , 169 F. Supp. 673 (E.D.N.Y. 1959)	12
<i>United States v. Sperling</i> , 506 F.2d 1323 (2d Cir. 1974), <i>cert. denied</i> , 420 U.S. 962, 421 U.S. 949 (1975)	1, 12
<i>United States v. Washington</i> , — U.S. — (1977), 45 L.W. 4465	10
<i>United States v. Werker</i> , 535 F.2d 198 (2d Cir. 1976)	4



**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-2037

HERBERT SPERLING,
Petitioner-Appellant,
—against—

UNITED STATES OF AMERICA,
Respondent-Appellee.

BRIEF FOR THE RESPONDENT-APPELLEE

Preliminary Statement

Herbert Sperling appeals from an order of the United States District Court for the Eastern District of New York (Platt, J.) entered on February 4, 1977, denying without a hearing appellant's *pro se* application pursuant to 28 U.S.C. § 2255 to vacate and set aside his judgment of conviction entered on November 4, 1971, following a guilty plea. It was claimed that the 1971 plea was involuntary and that the district court failed to comply with the requirements of Rule 11, Fed. R. Crim. P. Appellant is presently incarcerated following a 1973 federal narcotics conviction and sentence as a second offender by virtue of his November 4, 1971 conviction.¹

On appeal appellant contends that: (1) his November 4, 1971 plea of guilty was coerced by the court's participation in plea negotiations with his counsel; (2) there was no factual basis established for the acceptance of

¹ *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962, 421 U.S. 949 (1975).

the plea; and (3) the district court erred in denying, without an evidentiary hearing, appellant's motion pursuant to 28 U.S.C. § 2255 to vacate and set aside the November 4, 1971 conviction.

Statement of Facts

On September 22, 1959 appellant pleaded guilty before the Honorable Joseph C. Zavatt to violations of the federal narcotics laws, 21 U.S.C., §§ 173, 174, and on February 16, 1960 he was sentenced to a term of ten years imprisonment by the Honorable Matthew T. Abuezzo.² On September 3, 1971, petitioner moved to vacate the 1959 conviction and sentence alleging that he was not informed at the time of his plea of his ineligibility for parole.³ The application came before the

² The transcripts of the 1959 and 1960 proceedings are no longer available.

³ Although appellant's 1971 motion papers contained an additional allegation that appellant's 1959 plea was induced by his attorney's prediction that his sentence would run concurrently with a youthful offender sentence then being served by appellant (A3) (Hereafter numerals in parentheses preceded by the letter "A" refer to pages in the Appellant's Appendix), appellant apparently abandoned this argument by the time he appeared before Judge Costantino on November 4, 1971. The transcript of the court proceedings on that date reflect the following:

Mr. Santangelo [defense counsel]: Now this proceeding is a Section 2255 proceeding and was brought by the defendant, and his grounds for vacating this conviction and plea of guilty were the following:

That at the entry of the plea of guilty before Judge Zavatt the defendant contends by affidavit submitted to this Court that he would not have pleaded guilty had he known of the harsh provisions of the ineligibility of parole in respect to narcotics violations.

Appellant's § 2255 petition of October 26, 1976 before Judge Platt likewise never mentioned any reason for attacking the 1959 conviction other than the failure to inform appellant of his ineligibility for parole. Consequently, any discussion of a prediction of concurrent sentence by appellant's counsel in 1959 is not properly before this Court.

Honorable Mark A. Costantino, who on November 4, 1971, pursuant to an apparent agreement made among the prosecutor, the defendant and his counsel, and the court, vacated the prior plea. Under this agreement, appellant pleaded guilty to the same crimes and was sentenced to "time served plus four months." (A46).

After serving this sentence appellant was again convicted of narcotics violations and was sentenced on September 12, 1973 as a second offender by virtue of his November 4, 1971 plea. On October 26, 1976 appellant moved pursuant to 28 U.S.C. § 2255 to vacate the November 4, 1971 plea arguing that: (1) the trial judge had improperly interjected himself into the plea and sentence discussions and had made his decision to vacate the 1959 guilty plea on the "condition" that appellant plead guilty to the same crimes, thus coercing appellant into pleading guilty; and (2) the trial judge had failed to ascertain whether appellant had understood the nature of the charges and whether there was a factual basis for the plea.

The district court (Platt, J.) denied appellant's motion without a hearing and held that petitioner's argument in the 1971 proceedings that he was entitled to be informed in 1959 of his ineligibility for parole was meritless,⁴ and that the actions of the trial judge in vacating the prior plea and sentencing appellant to time served plus four months were harmless beyond a reasonable doubt since appellant served no more than the original ten year sentence (A77). Appellant sought reargument

⁴ Judge Platt noted in his decision that although this Court had held on October 4, 1970, that a defendant who pleads guilty must be informed of his ineligibility for parole, *Bye v. United States*, 435 F.2d 177 (2d Cir. 1970), it subsequently held on November 22, 1971, that the *Bye* decision would not be given retroactive application. *Korenfeld v. United States*, 451 F.2d 770 (2d Cir. 1971), cert. denied, 406 U.S. 975 (1972).

on February 10, 1977 (A79), which was denied on February 28, 1977 (A84).

ARGUMENT

POINT I

A Judge's Participation In Plea Negotiations Does Not Per Se Render That Plea Involuntary.

Appellant's guilty plea was not coerced by the fact that the court participated in plea negotiations with the petitioner and or his counsel, or both. We recognize the fact that the 1975 Amendment to Rule 11 expressly prohibits the trial judge's participation in plea discussions. Fed. R. Crim. P. 11(e)(1). This prohibition is underscored by this Court's decision in *United States v. Werker*, 535 F.2d 198 (2d Cir. 1976). However, as appellant points out in his brief, we are dealing here with Rule 11 as it existed on November 4, 1971, the date of the guilty plea he now seeks to vacate, and as of that date there was no such provision in Rule 11. Furthermore, prior to its decision in *Werker*, *supra*, this Court had held on more than one occasion that the participation of the trial judge in plea discussions does not in itself render the plea involuntary, *United States ex rel. Rosa v. Follette*, 395 F.2d 721, 725 (2d Cir. 1968); *McGrath v. LaVallee*, 348 F.2d 373 (2d Cir. 1965), *cert. denied*, 383 U.S. 952 (1966). In the final analysis, the Supreme Court mandates that the voluntariness of the plea can be determined only by considering all of the relevant circumstances surrounding it. *Brady v. United States*, 397 U.S. 742, 749 (1970).

The relevant circumstances surrounding the plea in the instant case were not the usual pre-trial and pre-conviction situation where the accused might legitimately be reluctant to reject a proposition offered by the trial

judge who would ultimately conduct his trial and impose sentence. *United States ex rel. Elknis v. Gilligan*, 256 F. Supp., 244, 254 (S.D.N.Y. 1966). On the contrary, in this case a rejection of the proposition or "condition" posed by the court did not mean that appellant would then be faced with going to trial before that same judge. Rather, if he choose not to replead, he could have appealed the court's denial of the motion to vacate appellant's 1959 guilty plea.

Thus, the contention that the court made vacation of the first plea contingent upon a second guilty plea and thus was coercive in nature is a fallacious argument in that it rests upon the presupposition that appellant had an absolute legal right to the vacation of this first plea. An examination of the case law existing at the time he appeared before the district court in 1971 reveals that such was not the case. Until 1970 it was an open question in this Circuit whether ineligibility for parole was a consequence of the plea about which a defendant in a narcotics case must be informed under Rule 11. At that time five Circuits had held it was such a consequence *Harris v. United States*, 426 F.2d 99 (6th Cir. 1970); *Jenkins v. United States*, 420 F.2d 433 (10th Cir. 1970). *Durant v. United States*, 410 F.2d 689 (1st Cir. 1969); *Berry v. United States*, 412 F.2d 189 (3d Cir. 1969); *Munich v. United States*, 337 F.2d 356 (9th Cir. 1964). On the other hand two Circuits held a contrary view. *Trujillo v. United States*, 377 F.2d 266 (5th Cir.), *cert. denied*, 389 U.S. 899 (1967); *Smith v. United States*, 116 U.S. App. D.C. 404, 324 F.2d 436 (1963), *cert. denied*, 376 U.S. 957 (1964).

On October 14, 1970 this Court held that a defendant pleading guilty to a narcotics offense must be informed by the district court of his ineligibility for parole. *Bye v. United States*, 435 F.2d 177 (2d Cir. 1970). How-

ever, the Supreme Court had already held that its decision in *McCarthy v. United States*, 394 U.S. 459 (1969), requiring that the defendant whose guilty plea is accepted in violation of prescribed procedure for acceptance of pleas must be afforded an opportunity to plead anew, would not be given retroactive effect. *Halliday v. United States*, 394 U.S. 831 (1969). Applying the non-retroactivity decision in *Halliday*, this Court held on November 22, 1971 that its *Bye* decision was not to be applied retroactively to pleas entered prior to October 14, 1970. *Korenfeld v. United States*, 461 F.2d 770 (2d Cir. 1971). Thus, the holding in *Bye*, notwithstanding, the district court could have properly denied appellant's 1971 motion by following the non-retroactivity reasoning set forth in *Halliday*. He would have then had little likelihood of success on appeal in light of the *Korenfeld* decision handed down shortly thereafter. In reality when the voluntariness of the new plea in 1971, is examined in light of these surrounding circumstances instead of the court's "condition" to petitioner representing a coercive threat, it was in fact appellant's only likely source of relief.

An examination of plea voluntariness standards set forth by the Supreme Court shows that the 1971 plea meets those standards: "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Clearly, appellant had a choice of pursuing the attack on his first plea, an attack that was doomed to failure on the grounds he raised, or repleading and serving a short sentence which would take less time than the appeal of a denial of his motion. He cannot now be heard to say that his plea was involuntary simply because he felt he had no other choice than to adopt the better of what to him were certainly two unpalatable alternatives. *United States ex rel. Delman v. Butler*, 390 F. Supp. 606 (E.D.N.Y. 1975).

Finally, as stated in *Brady, supra* at p. 755: "A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the *court* (Emphasis added), prosecutor or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)", citing *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957).

Nowhere in the record is there any indication that the 1971 plea was induced by "threats", "misrepresentation" or "promises having no proper relation to the prosecutor's business." *Id.* To constitute fear and coercion in entering a guilty plea the accused must show that he was subjected to threats or promises of illegitimate action. *Ford v. United States*, 418 F.2d 855 (8th Cir. 1969). The commitment or promise made by the court in the instant case, albeit inartfully phrased as a "condition," we contend, does hardly rise to the level of a threat, misrepresentation or promise of illegitimate action.

POINT II

The Defects In The Plea Proceedings Were Not Such As To Deprive Appellant Of Any Substantial Right.

It is contended that the record of the 1971 plea of guilty is insufficient to establish that the district court properly ascertained that appellant understood the nature of the charges and that there was a factual basis for the guilty plea. It is our position that, although the case is a difficult one, involving somewhat unique circumstances, the court in 1971 satisfied the requirements of the then

extant Rule 11 of the Federal Rules of Criminal Procedure.⁵

As of that date, Rule 11 read in its pertinent part as follows:

"... The court ... shall not accept [a plea of guilty] without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. ...

The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." Fed. R. Crim. P. 11 [as amended July 1, 1966].

In *McCarthy v. United States*, 349 U.S. 459 (1969) the Supreme Court held, with regard to this earlier version of Rule 11, that if the trial court accepts a defendant's guilty plea without fully adhering to the procedure set for in Rule 11, the defendant is entitled to plead anew. Appellant here claims that the district judge did not inquire of him whether he understood the nature of the charges against him, nor did the judge establish that there was a factual basis for the plea. Therefore, so his argument runs, he should be permitted to replead to the indictment. In *McCarthy*, the Supreme Court noted, however, that the Rule 11 inquiry "must necessarily vary from case to case", and that it was not establishing "any general guidelines other than those expressed in the Rule itself." *McCarthy, supra* at pp. 465-467, n.20. In other words, as the Supreme Court put it, "reality" rather than

⁵ We of course recognize that in *United States v. Jounet*, 544 F.2d 633 (2d Cir. 1976) this Court mandated literal compliance with Rule 11 of the Federal Rules of Criminal Procedure, as amended December 1, 1975. However, we are dealing here with the prior version of Rule 11 as it existed on November 4, 1971 and not the new Rule.

mere "ritual" should control. *Id.* Subsequent to the *McCarthy* decision this Court held that a determination of whether the defendant understood the nature of the charge at the time of entering a plea of guilty must necessarily vary from case to case. *Irizarry v. United States*, 508 F.2d 960, 965 n.4 (2d Cir. 1975). Clearly, what is important with respect to the prior Rule 11 is that instead of requiring the court to follow an exact ritual, that there be "substantial compliance" with the spirit and purpose of the Rule. *Sappington v. United States*, 468 F.2d 1378 (8th Cir. 1972), *cert. denied*, 411 U.S. 970 (1973). Finally, in a decision dealing with the prior Rule 11, *Kloner v. United States*, 535 F.2d 730, 733 (2d Cir. 1976), this Court stated that:

" . . . a resulting plea may be upheld as long as the district judge has adequately informed the defendant of the alternative courses of action open to him, [citations omitted] so that the defendant has not, either because of ignorance and misinformation, been misled into entering the plea."

Consequently, the record must be viewed in the totality of the surrounding circumstances to determine whether the defendant was "sufficiently aware of the consequences of and alternatives to his guilty plea to render his plea a voluntary and intelligent one." *Kloner, supra*, at p. 734.

An examination of the "totality of the circumstances" in this case shows clearly that appellant represented by able and experienced counsel, was seeking a benefit to which he was not then entitled as the decisional law stood. The "reality" of what occurred in the 1971 proceedings was that in a complex manner designed to avoid the strictures of Rule 35 of the Federal Rules of Criminal Procedure he was given a reduction of his original sentence. The Supreme Court has even recently instructed the courts not to "ignore the record and reality."

United States v. Washington, — U.S. — (1977), 45 L.W. 4465, 4467. When examined in the light of all the circumstances it is unrealistic to attempt to equate those November 4, 1971 proceedings with the usual pre-trial, pre-conviction plea situation.

Appellant was before the district court in 1971 challenging his earlier 1959 plea of guilty *solely* on the basis that at the time he had pleaded guilty in 1959 he did not understand the consequences of that plea because he had not been advised that there would be no parole eligibility under the counts to which he was pleading guilty. He did not challenge the 1959 plea on the basis of a lack of understanding of the nature of the charges. Likewise, he did not challenge the 1959 plea on the premise there was no factual basis for that plea. Indeed, it should be noted that even to the present day there still has been no allegation that appellant did not, in fact, understand the nature of the charges to which he pleaded in 1959 and to which he subsequently repleaded in 1971. Nor has there been any allegation that there was not, in fact, a factual basis for these pleas. Accordingly, as the record demonstrates, the district court's emphasis in the 1971 proceeding was on the only aspect of the 1959 plea which then was challenged. It is reasonable to conclude that if there was no dispute on November 4, 1971 that appellant understood the nature of the charges to which he had originally pleaded, and if there then was also no dispute that there had been a factual basis for that plea, when he repleaded to exactly the same charges in 1971, none of the parties involved believed that the in-depth inquiry required in the usual plea situation was necessary.⁶ Such an inquiry would have been to conduct exactly that formalistic ritual condemned by *McCarthy* as long as there is substantial compliance with Rule 11.

⁶ While we do not contend this is the preferred practice, we do not believe that under the circumstances, the procedure was so inadequate as to render the plea of guilty invalid.

The record of the 1971 plea reveals that the court did substantially comply with Rule 11, although, concededly, there was a failure to conduct an in-depth inquiry. It can be determined from this record that appellant was repleading to the same seven counts of the seventeen count 1959 indictment to which he had originally pleaded. At the time, the court explained to him that each of these counts involved the possession and sale of narcotics. Moreover, at the time of these proceedings the record shows that defense counsel had the prior sentencing minutes. The court then addressed appellant directly and inquired whether he wished to plead guilty to those same counts of the 1959 indictment, which he then enumerated. (A41). After advising him of his rights to a jury trial, to confront witnesses, to call witnesses in his own behalf and to not incriminate himself, the court specifically asked him if anyone was forcing him to take the plea. Appellant replied in the negative (A41-42). The fact that there was an agreed upon condition was also placed on the record. Thereafter, appellant was asked by the court if he was offering his plea voluntarily and with full knowledge of what was happening. Appellant replied that he was (A42). Appellant was informed he was not eligible for parole, and although the court did not state the maximum sentence to which he could be sentenced, it is clear from the record and the affidavit filed by appellant in 1971, that he was fully aware of the exact sentence that the court intended to impose, a sentence which in fact was immediately thereafter imposed. The court also established that appellant understood the nature of the charges to which he was pleading guilty and that there was a factual basis for the plea by personally asking him to explain in his own words to what he was pleading guilty, to which appellant replied that he was pleading guilty to "conspiracy and sale to violate the narcotics laws." (A 43). After some fencing with the court, he also admitted that the narcotic involved was heroin. (A43).

It must be recalled that these 1971 proceedings, that we have just outlined, were initiated by appellant's affidavit and motion papers wherein he himself referred to the charges to which he had previously pleaded guilty. (A34). It is somewhat disingenuous for him to urge, at this late date, that his second plea must be vacated because of the court's failure to explicitly outline the charges, when it is demonstrated by his own 1971 motion papers that he fully understood the nature of the 1959 charges.⁷

Although we have addressed ourselves to the merits of appellant's claim that the November 4, 1971 plea proceedings were defective under Rule 11 structures, we seriously question the availability of a Section 2255 proceeding. In *Davis v. United States*, 417 U.S. 333, 346 (1974) the Supreme Court stated:

This is not to say, however, that every asserted error of law can be raised on a § 2255 motion. In *Hill v. United States*, 368 U.S. 424, 429 (1962) for example, we held that "collateral relief is not available when all that is shown is a failure to comply with the formal requirement" of a rule of criminal procedure in the absence of an indication

⁷ It should be noted, at this point, that appellant was convicted of a subsequent violation of the federal narcotics laws in 1973 and sentenced to a term of life imprisonment. This conviction was affirmed on appeal. *United States v. Sperling*, *supra*, 506 F.2d 1323. It appears that he found no fault with this 1971 conviction until 1976, five years after the events in question. While the doctrine of "laches" is inapplicable to a § 2255 motion, *Heflin v. United States*, 358 U.S. 415 (1959), the timeliness of petitioner's belated application, we believe, is a factor to be considered. Certainly, the "lapse of time effects the good faith and credibility of this petitioner." *Rake v. United States*, 2331 F.Supp. 813, 817 (W.D. Va., 1964); See also *United States v. Monte*, 169 F. Supp. 673 (E.D.N.Y. 1959).

that the defendant was prejudiced by the asserted technical error. We suggested that the appropriate inquiry was whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[I]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Id.*, at 428.

Certainly there was no "complete miscarriage of justice" in the case at bar. On the contrary, by receiving a vacatur of his original conviction and being allowed to replead and serve a short sentence, appellant was spared the necessity of pursuing a dubious appeal which might have taken months and resulted in less favorable treatment than he received.

Even where it is determined that a defendant may raise a Rule 11 violation by a Section 2255 petition, this Circuit has held that there must be greater flexibility in a collateral review of a Rule 11 claim than on direct review. *Del Vecchio v. United States*, — F.2d —, (Slip op. 805) (2d Cir., decided May 24, 1977). There the Court stated:

[R]igid enforcement of the Rule many years after the plea has been taken erodes the principle of finality in criminal cases and may allow an obviously guilty defendant to go free because it is impossible, as a practical matter, to retry him.— [W]hen a defendant takes no appeal and collaterally attacks the conviction years later, the different considerations we have already referred to come into play . . . [W]e believe that, for the reasons already given above, there must be flexibility in the collateral review of a Rule 11 claim . . . [A] defendant must at least show prejudice affecting the fairness of the proceedings or the voluntariness

of the plea in order to succeed in a collateral attack based upon a Rule 11 violation. *Id.* at 3724-3728.

In the instant case since there was substantial compliance with Rule 11 and no prejudice resulting to his defendant who, as a result of these proceedings, received a benefit to which he was not absolutely entitled, the appellant's claim cannot withstand collateral review standards.

POINT III

The District Court Properly Rejected Appellant's Motion To Vacate And Set Aside His Sentence And Conviction Without An Evidentiary Hearing.

Where a motion under 28 U.S.C. § 2255 to vacate and set aside a sentence and conviction sets forth detailed factual allegations of circumstance *outside* of the record and knowledge of the trial judge which, if true, would justify relief, a hearing is required. *Fontaine v. United States*, 411 U.S. 213 (1973); *Machibroda v. United States*, 368 U.S. 487 (1962).⁸ In the instant case, whether or not appellant was entitled to relief could be easily determined from the record. Appellant attacked the November 4, 1971 conviction because the trial judge had participated in the plea proceedings, and further claimed that there was no determination in those proceedings of whether there was a factual basis for the plea or whether appellant understood the nature of the

⁸ § 2255 provides, in pertinent part:

—unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.—

charges to which he was pleading. There was no dispute that the trial judge had in fact participated in the 1971 plea proceedings. That was clearly demonstrated in the transcript. Whether or not a factual basis had been established or whether or not the trial judge had determined if the appellant understood the nature of the charges could also be determined by reading the transcript. Therefore, the question of what relief, if any, appellant might have been entitled to, could be determined by perusal of the record of the November 4, 1971 proceedings and the moving papers that had initiated those proceedings. Accordingly, there was simply no necessity for a hearing, and its denial was therefore not error.

CONCLUSION

The order appealed from should be affirmed.

Dated: Brooklyn, New York
July 29, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
MARILYN GAINES,
Assistant United States Attorneys,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 2nd day of August 1977 he served a copy of the within
Brief for The Appellee

by placing the same in a properly postpaid franked envelope addressed to:
Herbert Sperling, PO Box PMB, Atlanta, Ga 30315

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, 225 Cadman Plaza East,
Borough of Brooklyn, County
of Kings, City of New York.

Dolores A. Byrd

Sworn to before me this
2nd day of August 1977

Barbara A. Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4546824
Qualified in Kings County
Commission Expires March 30, 1979